

JDS Constr. Group LLC v Copper Servs., LLC

2023 NY Slip Op 30616(U)

March 1, 2023

Supreme Court, New York County

Docket Number: Index No. 656912/2020

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

JDS CONSTRUCTION GROUP LLC,

Plaintiff,

- v -

COPPER SERVICES, LLC, TALISMAN CASUALTY
INSURANCE COMPANY, LLC

Defendant.

INDEX NO. 656912/2020

MOTION DATE 10/27/2022,
01/20/2023

MOTION SEQ. NO. 005 007

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 192, 193 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 248, 249, 250, 251, 252 were read on this motion to/for DISCOVERY.

Copper Services, LLC’s (**Copper**) motion (Mtn. Seq. No. 5) to vacate the default judgement must be denied. Copper indicates that it is entitled to vacate the default judgment asserted in this action because Larry Hollander, their lawyer in other matters (i) indicated that Talisman Casualty Insurance Company, LLC (**Talisman**) was “paying [Mr. Hollander] to appear on [Copper’s] behalf” (NYSCEF Doc. No. 187) in this lawsuit and (ii) acknowledged “mine [answer to the complaint] due on the 19th” (NYSCEF Doc. No. 170) and that as a result they expected him to file an answer. This they suggest indicates that they had a reasonable excuse for failing to file an answer and that they also failed to timely respond to the default judgment motion that was also properly served on them. Their argument fails for at least three reasons.

First, on the record before the Court, the email that they point to confirms that they knew of the lawsuit and that an answer was due because they sent the summons to Mr. Hollander. As their agent, if Mr. Hollander chose not to file an answer, this in it and of itself does not suggest law office failure. On the record before the court, Mr. Hollander did not sign the representation letter. Significantly, no affidavit is produced from Mr. Hollander or anyone proffering a reason as to why the answer was not filed. The only explanation offered is that Mr. Hollander was Copper's lawyer for many years in other matters and Copper expected him to do it here. This is plainly not a reasonable excuse. It may well be that Mr. Hollander did not file papers because although he indicated that Talisman was going to pay for the defense, Talisman was going to reimburse Copper and Copper was not prepared to pay Mr. Hollander and seek reimbursement from Talisman or that Talisman ultimately decided that it was going to have its own lawyers represent Copper (as insurance companies and bonding companies often do).

Second, the record is bereft of any communications as one would expect when the default judgment motion was served. To wit, if Copper really expected that Mr. Hollander had filed an answer and they were served with a default judgment motion, one would expect Copper to write Mr. Hollander or call him and inquire as to why they were being served with a default judgment notice. Copper does not suggest that they were unaware of their obligations or were not properly served or that any such communication took place with Mr. Hollander. This too suggests that the default here was knowing and willful and that a reasonable excuse for the default does not exist.

Three, Talisman was aware of this lawsuit and has appeared throughout the pendency of this lawsuit. If it was their obligation to provide a defense and/or pay Mr. Hollander and they saw

that Copper was not appearing in this lawsuit, the record does not include suggest Talisman failed to notify Copper of their default in failing to file an answer or in failing to respond to the default judgment motion. Given the impact on Copper's obligations under the performance bonds if Talisman had indicated that it was paying for the defense costs, one would expect Talisman to ensure that Copper filed papers in this case or that they reserved their rights as against Copper based on Copper's failure to respond. Thus, the motion to vacate default judgment must be denied.

Talisman's motion to motion (Mtn. Seq. No. 7) to compel must be granted solely to the extent that the Plaintiff must provide an affidavit that they do not possess any other documents relating to (i) their Damages Summary, (ii) additional legal, design professional, and delay costs, (iii) meeting minutes, and (iv) defective CPVC piping and fan coil units which they have not already produced by March 8, 2023 at 5 pm.

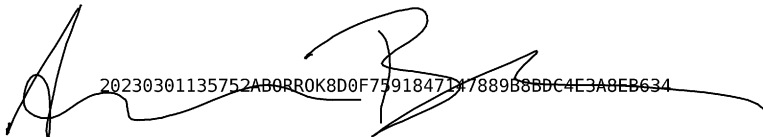
Reference is made to a Decision and Order dated November 1, 2022 (the **Prior Order**; NYSCEF Doc. No. 189), pursuant to which the Court had narrowed the scope of discovery by rejecting Talisman's discovery requests with respect to (i) concurrent delays and (ii) the Plaintiff's internal e-mails. In this instant motion, Talisman asserts that the Plaintiff fails to produce a number of documents that fall in the following categories and must therefore be precluded from introducing those as evidence at trial, or alternatively be compelled to produce: (i) proofs of payment to Copper, (ii) proofs of payments made to third parties as relates to Plaintiff's damages, (iii) documents relating to the Plaintiff's claim for damages for payments by non-parties, (iv) documents relating to delays caused by non-parties, (v) schedule impact analyses, (vi) documents

and internal e-mails relating to the Plaintiff's failure to pay Copper, failure to approve change orders, termination of the Subcontract, and (vii) documents relating to defective piping and fan coil units. As the Court had indicated in the Prior Decision, Talisman is not entitled to the Plaintiff's internal e-mails because it is overbroad and unnecessary and as such, Talisman can not now seek to compel these e-mails. The Plaintiff also represents that they have produced a number of documents in response to Talisman's remaining document demands for (i) their Damages Summary, (ii) additional legal, design professional, and delay costs, (iii) meeting minutes, and (iv) defective CPVC piping and fan coil units as directed in the Prior Order. As such, they must provide an affidavit that they do not possess any other documents relating to the foregoing by March 8, 2023 at 5 pm. The branch of the motion seeking to preclude the Plaintiff from introducing certain testimony or evidence at trial must be denied because there is no willful and contumacious noncompliance on the Plaintiff's part simply based on the fact that the Plaintiff did not produce documents evidencing all the damages they allegedly suffered to the full dollar amounts (CPLR 3126[2]; *Sanchez v City of New York*, 266 AD2d 127, 127 [1st Dept 1999]; *Cano v BLF Realty Holding Corp.*, 243 AD2d 390 [1st Dept 1997]).

It is hereby ORDERED that Copper's motion (Mtn. Seq. No. 5) to vacate default judgment is denied; and it is further

ORDERED that Talisman's motion (Mtn. Seq. No. 7) to compel must be granted solely to the extent that the Plaintiff must provide an affidavit that they do not possess any other documents relating to (i) their Damages Summary, (ii) additional legal, design professional, and delay costs,

(iii) meeting minutes, and (iv) defective CPVC piping and fan coil units which they have not already produced by March 8, 2023 at 5 pm.


20230301135752AB0RR0K8D0F75918471A7889588BDC4E3A0EB634

3/1/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE